



## **Submissions by The Law Society's Property Committee on the Consultation Paper on "*Proposed Amendments to the Building Management Ordinance (Cap.344)*"**

The Property Committee of the Law Society has considered the various proposals the Administration put forward in its May 2003 Consultation Paper on "*Proposed Amendments to the Building Management Ordinance (Cap. 344)*" and has the following comments:

### **1. Personal liabilities of members of a management committee ("MC") for the decisions of an owners' corporation ("OC")**

The Administration proposes to add an express provision to the Building Management Ordinance ("*BMO*") to generally exempt members of the MC of an OC from being personally liable for the collective decision of the OC.

*The Committee accepts this proposal in principle subject to "collective decision" and "tortious act" being clearly defined.*

### **2. Power of an OC to borrow money from the Government in compliance with certain statutory notices, orders or other documents**

A proposal is made to amend the BMO to empower an OC to borrow money from the Government on behalf of those owners who have failed or refused to pay their respective shares of the costs for works conducted in compliance with the statutory notices, orders or other documents relating to the common parts of the building. As security for the loan, the Government is entitled to register charges against the titles of these owners' properties.

*The Committee urges the Administration to carefully consider the implications of the proposal on the public fund to ensure that any public money will be properly spent.* In this regard, the Administration should bear in mind that: (a) some owners may not be contemplating any sale of their properties and thus will not be too concerned about releasing their properties from the charges; and (b) the Building Department already has the existing statutory power to first carry out urgent work and recover the costs involved from the owners. *Should the*

*Administration decide to proceed with the present proposal, the Committee submits that an appeal mechanism should be put in place to ensure that the interest of the affected owners will be properly protected.*

### **3. Termination of appointment of the DMC Manager**

The Administration proposes to introduce different mechanisms for terminating the respective appointment of a DMC manager and a subsequent OC appointed manager.

*The Committee objects to the proposed amendment as being contrary to the principle of freedom of contract. There is also no reason why the DMC Manager should be treated differently. Under the proposal, DMC manager may be removed during the term of his appointment when the other/subsequent managers are not subject to the same treatment. However, if the other/subsequent managers may also be removed during the term of appointment, then there will be no end to it. The proposed amendment also means that an unduly small number of owners will be able to terminate the appointment of the DMC Manager.*

*The Committee is also concerned with the possible confusion caused by the various quorum and voting requirements under the different termination mechanisms.*

*The Committee submits that paragraph 7 of the seventh schedule to the BMO is in itself inadequate in the sense that it does not properly provide for how voting is to be done for “phased development” where part of the development is still a vacant site. Under subparagraph 5A, for the purpose of passing a resolution for termination of the manager’s appointment under subparagraph 1, only the owners of shares who “pay or who are liable to pay” the management expenses relating to those shares shall be entitled to vote. As no management fee is payable in respect of certain uncompleted portions, the developer holding that portion will be barred from voting.*

### **4. The appointment of the MC**

The Administration proposes to clarify on the resolution requirement for appointment of the first MC under section 3(2) of the BMO by introducing an additional requirement for the resolution to be also passed by a majority of the votes of the owners voting either personally or by proxy at the same meeting.

*The Committee welcomes this proposed amendment to clarify the resolution requirement for the purpose of section 3(2) and believes that similar*

*clarification should be made for the resolution requirement in paragraph 7 of the Seventh Schedule to the BMO.*

5. **Appointment of members and holders of office of the first and subsequent MC**

The Administration proposes amendments to the BMO to clarify the appointment procedures of members and holders of office of the first and subsequent MC.

*The Committee has the more general concern that the Second Schedule to the BMO does not tally with the DMCs in most cases.* In most DMCs, “Owners’ Committee” is used rather than “Management Committee”.

*There is the further concern that for composite development, the Second Schedule does not specify the representatives to be elected from each type of accommodation within that development to ensure that the interests of all types of owners will be properly reflected.* There could be situation where one category of owners will dominate the MC. As the Second Schedule is mandatory, it requires clear wordings for the composition under the DMC to also apply to the MC.

A third concern is on the lack of clarity as to the entitlement to allowance under Section 18(2)(aa) of the BMO as well as the respective status of the Secretary and Treasurer.

Section 18(2)(aa) provides that subject to certain conditions, certain specified office bearers including the secretary, treasurer and “*other holders of office of the MC*” appointed under the Second Schedule is entitled to allowances. It is not at all clear whether an owner once appointed as a MC member but does not hold any office as specified in Section 18(2)(aa) will be considered to be “*other holders of office of the MC*” within the meaning of the Section. These members of the MC may not be contributing any less effort in the control, management and administration of the building.

Regarding the position of a Secretary or a Treasurer, they may not necessarily be a member of the MC. Whilst they will clearly be entitled to the allowances if they are so appointed, questions will arise as to whether they are entitled to vote in the relevant MC and whether their respective appointments will affect the number of person constituting the MC under Paragraph 1 of the Second Schedule to the BMO and particularly, its quorum.

*The Committee urges that clarifications be made in the BMO to clarify the position vis-à-vis the Secretary and Treasurer and to ensure that members of the MC will be entitled to allowances.*

## 6. Procurement of supplies, goods and services by an OC

The Administration has made proposals to improve the requirements regarding procurement of supplies, goods and services by an OC. One proposal is to insert a punitive clause to impose criminal sanction upon any member of a MC who contravenes the requirements unless he can prove that the offence was committed without his consent or connivance and that he has exercised all such due diligence to prevent the commission of the offence.

*The Committee objects to the punitive clause. This seems to run contrary to the spirit of the legislative proposal put forward by the Administration as recited in paragraph 1 hereof. The imposition of criminal liability will discourage owners' participation in serving as a MC member and the objective to encourage owners' participation in the management and maintenance of their properties will be defeated.*

More importantly, it is always the case that even though the owners are incorporated, the management of the relevant building will still be left in the hands of the manager. *The Committee takes the view that if any manager is engaged, he should be primarily responsible to make sure that the relevant requirements are followed and the proposed punitive clause should impose penalty against the manager instead of against any MC member, save and except when there is any element of bribery.*

The Administration also proposes to lower the threshold requiring the procurement of tender from 20% to 10% of an OC's annual budget. As this will increase the frequency of EGMs and thus the workload of the owners' corporation, *the Committee suggests that the managers and MCs should be consulted.*

## 7. Other Comments

In addition to the above points, the Committee would also wish to highlight its concerns on the more fundamental problems with the BMO, which have not been canvassed in the present Consultation Paper. Some of these concerns have already been pointed out to the Administration during its consultation process in 2000. To avoid any need for repetition, the Committee attaches its submissions dated 6 April 2000 as **Appendix A**. Some of the Committee's more significant concerns include:

(a) **Anomalies and Confusion between the BMO and the LACO's DMC Guidelines.**

The Committee observes that there are inconsistency between the requirements of the BMO and the LACO's DMC Guidelines. An

example will be whilst incorporation of the Eighth Schedule to the BMO is optional under the Ordinance, under the DMC Guidelines; LACO requires the mandatory inclusion of the Eighth Schedule to the DMCs under the consent scheme. Essentially, this will amount to legislation by LACO by administrative means.

*The Committee believes that the Administration should have a thorough review of the BMO and the DMC Guidelines particularly the correlation between the two to reduce any conflict between the owners and the manager.*

(b) **Application of the BMO to non-residential buildings**

*The Committee believes that the application of the BMO to non-residential buildings has to be reviewed as the BMO provisions are drafted with residential developments in mind.* For example, the term “flat” is used and car parking spaces are not included under the Second Schedule.

(c) **Developments with no allocation of undivided shares**

The existing mechanism provided in the BMO for formation of MC and OC is not available to buildings or groups of buildings where there is no allocation of undivided shares.

Whilst the Committee notes the suggestion made by a professional group that for development with no undivided shares, incorporation and voting be made by reference to GFA, it believes that this has to be carefully considered by the Government because of the lack of any clear definition for “GFA”. For property developments, “GFA” has different meaning when used in different context. For example, there is “GFA” definition under the Buildings Ordinance, the Government Grant and the Guidelines for drafting DMC where Government Accommodation is involved. If “GFA” is used, the Government needs to specify which GFA definition has to be followed

(d) **Single development on lots with different Government Grants and DMCs**

There seems to be difficulties when owners are incorporating themselves in situations where a single development is erected on different lots with different DMCs, but with the owners of the whole development sharing common facilities. An example will be the Austin Mansion which is a single building with 6 units on each of the 12 storeys but which stands on lots under 6 Government Leases with 6 DMCs. Whilst the 6 DMCs are virtually identical, as the 72 owners do not have common undivided

shares, they were forced to incorporate themselves into 6 OCs which is a very draconian situation

(e) **Confusion in the quorum and voting requirements of different meetings**

The different criteria adopted in the BMO to calculate the percentage of owners or owners' interest necessary to convene meetings of the OC, to constitute sufficient quorum and votes to pass different resolutions at such meeting may cause confusion to the property owners and their advisers.

**The Property Committee  
The Law Society of Hong Kong  
31 July 2003**